



### **EXHIBITS FOR PETITIONER:**

A, A-1, B, B-1, B-2, B-3, C, C-1, C-2, C-3, C-4, D, E-1, E-2, E-3, E-4, E-5, E-6, E-7, F, G, H, I, J, K, L, M, N-1, O, P, Q-1, Q-2, Q-3, R-1, R-2, R-3, R-4, R-5, R-6, R-7 and R-8

### **ISSUE FOR DETERMINATION:**

Did Respondent meet its burden of proof that it had just cause to dismiss Petitioner in accordance with N.C.G.S. § 126-35? Was the Petitioner dismissed from her job as an Attorney I with the Human Relations Commission for “just cause” due to her insubordination, violation of known or written work rules of the Commission and/or releasing confidential information to the detriment of the Commission?

### **DECISION**

Based upon consideration of the sworn testimony of the witnesses presented at the hearing, the documents which are part of the record and exhibits offered, received and admitted into evidence and the entire record in this proceeding, the Court makes the following:

### **FINDINGS OF FACT**

1. The North Carolina Human Relations Commission [hereinafter “HRC”] was created by N.C.G.S. § 143B-391 and is a Division of the Department of Administration with a number of statutorily created duties, including enforcing and administering the State Fair Housing Law. It also promotes, through education and outreach, the principles of equal opportunity and justice and nondiscriminatory acts even with employment. (T p. 14).

2. HRC has the ability to investigate and litigate Fair Housing claims pursuant to N.C.G.S. § 41A-7(e) and, pursuant to N.C.G.S. § 99D-1 (b1), to “...bring a civil action on behalf, and with the consent, of any person subject to a violation of [that] Chapter” dealing with civil rights.

3. Petitioner was employed by the North Carolina Department of Administration (hereinafter “NCDOA”), Human Relations Commission (hereinafter “HRC”) as a staff attorney (Attorney I) until her dismissal on August 24, 2009.

4. At all times relevant to this matter, the HRC had an Executive Director who was appointed by and served at the pleasure of the Governor of the State of North Carolina, investigators known as “Human Relation Specialist/Investigators” and positions for two staff attorneys, an Attorney I and an Attorney II. The Attorney II served as General Counsel of the HRC, received a higher pay rate and supervised the Attorney I. [T-312]

5. The HRC investigates claims of discrimination and determine whether or not such claims should be designated as “cause” when there is evidence of unlawful discrimination or “no cause” when evidence of unlawful discrimination is not found. When appropriate, HRC would then attempt to remedy the discrimination through settlement and discourse or with litigation if appropriate and/or necessary. [T-354-55]

6. The Petitioner, Millie E. Hershner, received an undergraduate degree, a Master's degree in Cell Biology and was working on her PhD in Cell Biology, but discontinued her education and became a stay-at-home mother for the next eighteen years. [T 348]

7. When the youngest of her three children left home for college, Ms. Hershner enrolled in the night school program at N.C. Central University School of Law, graduating Cum Laude in 2001. She passed the N.C. Bar Examination that same year. [T-348]

8. Ms. Hershner worked in law in the private sector for two years. She sought a job with the N.C. State Government because at that time, if one worked for five years with the State and reached the age of sixty-five years old, one could be eligible for State retirement benefits. [T-349]

9. Ms. Hershner interviewed for the Attorney I Position at the HRC with Sherry Brooks, who at that time held the Attorney II position as "Agency Counsel" with the HRC. The Attorney I position was open because of the resignation of Victoria Homick from the HRC. [T-350]

10. On June 15, 2005, Ms. Hershner was hired by HRC as an Attorney I. Ms. Brooks began to train Ms. Hershner in the duties and obligations of attorneys in both the position of Attorney I and Attorney II, explaining to Ms. Hershner that she, Ms. Brooks, was exploring other opportunities and may not be at the HRC much longer. Should Ms. Brooks leave, Ms. Hershner would be the only attorney working for the agency and with little experience. [T-350-51, Exhibit A]

11. Within four months of Ms. Hershner being hired, Sherry Brooks did in fact leave the employment of the HRC, leaving the Attorney II position vacant. As the only attorney for the agency, Ms. Hershner performed the work of both attorneys for approximately six months. [T-351]

12. Richard Boulden graduated from law school in 1986 and passed the N.C. Bar Examination in 1989. He worked at various jobs in the legal field. In 1995, after a divorce, he was not employed for a period of approximately two years. He was employed in non-legal employment for approximately eight years before being hired as an Investigator for the HRC in approximately 2003. Mr. Boulden was hired by Sherry Brooks, who at the time of his hiring was the acting Executive Director of the HRC. [T-249-52]

13. When Victoria Homick resigned her Attorney I position in 2005, Mr. Boulden was still employed as an Investigator with the HRC. He applied for the Attorney I position vacated by Ms. Homick. [T-253]

14. Ms. Brooks was responsible for making the hire for the Attorney I position and she had worked with and known Mr. Boulden since 2003. In filling the Attorney I position, she hired Ms. Hershner over Mr. Boulden. [T-253, 350]

15. The North Carolina Department of Administration uses the "Performance Management System" [PMS] which is an employee management system to purportedly facilitate the evaluation and management of employees and staff and which requires annual recorded performance appraisals for all Department of Administration employees. [Exhibit A]

16. The PMS requires that a "Work Plan" be established at the beginning of the annual work cycle, and at least one "Interim Review" be conducted in the middle of the annual work cycle. Additional Interim Reviews may be conducted during the work cycle, but are optional. A "Final Appraisal" should be conducted at the end of the annual work cycle. All reviews are required to be conducted and recorded by the employee's supervisor, signed by the employee, the employee's Supervisor and the employee's manager, which are made a part of the employee's employment file with the Department of Administration. [Exhibit A, T-57-60]

17. Ms. Hershner's employment began after that year's work cycle for HRC had begun and at the time of the end of the cycle on March 31, 2006, the Attorney II position had not been filled, so her Final Appraisal was conducted by the Executive Director of the HRC at that time, Mr. George Allison, without a direct Manager's signature or participation. [Exhibit A, T-360]

18. On Ms. Hershner's first PMS Work Plan conducted by Mr. Allison, her work was rated as "VG" in all but five of the thirty-four categories in which she was evaluated and in those five categories, she received a rating of "G". Ms. Hershner's overall rating was "VG", which meant that overall Ms. Hershner "...[met] the defined job expectations and, in many instances, exceed[ed] job expectations...[and was]...generally doing a very good job." [Exhibits A, B]

19. The only constructive remark which suggested any necessary change in her performance on that work evaluation in Exhibit A written by Mr. Allison, was that he believed Ms. Hershner perhaps became too involved with trying to assist her clients with non-legal matters, a criticism with which Ms. Hershner wrote she generally agreed. She clarified in writing on the evaluation that it had occurred on only one occasion rather than "occasionally" as Mr. Allison had written when she was concerned about a client's need for therapeutic assistance for severe depression. [T-361, Exhibit A]

20. When Ms. Brooks left the employment of the HRC approximately four months after Ms. Hershner was hired, leaving the Attorney II position vacant, both Mr. Boulden and Ms. **Hershner applied for the Attorney II position. Then Executive Director, George Allison, hired Richard Boulden to replace Ms. Brooks as the Agency Counsel, making him Ms. Hershner's supervisor.** [T-254]

21. Until Mr. Boulden became the HRC Agency Counsel and her supervisor, there is no evidence that Ms. Hershner had ever had any disagreement with Mr. Boulden, except one instance regarding the "cause" or "no cause" determination of the Robinson case. In that case, Mr. Boulden was the HRC investigator assigned to conduct the investigation. [T354]

22. In the Robinson case, Mr. Boulden and Mr. Allison agreed that the claim should be determined "cause" and Mr. Boulden had preliminarily written the case up as if it would be

determined a “cause” case. The next step in the HRC process is attorney review. In conducting her attorney review, Ms. Hershner investigated the matter and disagreed with Mr. Boulden and determined that the matter should be a “no cause” case. [T-354-56]

23. The matter was a source of considerable disagreement in the case review between the three, which ended in an impasse when Ms. Hershner explained that Rule 11 of the Rules of Civil Procedure prohibited her from signing the pleadings in a case which she knew was not supported by the law or the facts. [T-356]

24. In order to resolve the dispute, Ms. Hershner suggested that they consult an independent attorney to analyze the case and make a recommendation on the “cause” or “no cause” determination, and if that attorney agreed that the matter should be “caused”, then Ms. Hershner would agree to write it up and sign off on it in that way. [T-357]

25. Mr. Boulden selected Victoria Homick, the attorney Ms. Hershner was hired to replace at the HRC, to review the case. On review Ms. Homick agreed with Ms. Hershner that the Robinson matter should be “no cause”. [T-356-58]

26. The Robinson determination had not been completed when Mr. Boulden was hired to fill the Attorney II position vacated by Sherry Brooks and become the Agency Counsel on April 1, 2006.

27. Ms. Hershner objected to the manner in which Mr. Boulden wrote the final determination in as much as it read as if it was meeting all the factors of a “cause” determination, but illogically concluded “no cause”. Ms. Hershner also objected because Mr. Boulden’s final version left out many relevant pieces of information. Mr. Boulden became angry at Ms. Hershner and at one point shouted at her to give him the Robinson file. Mr. Boulden had written the final determination using much the same phraseology that he had used as the investigator in writing it as a “cause” case. [T-262, 358-59, 338-39]

28. On June 14, 2007, Ms. Hershner was called to a meeting in the office of the Executive Director by Mr. Boulden with Mr. Allison and Mr. Boulden for her annual Performance Management review.

29. Prior to that meeting and since Mr. Boulden had become her supervisor the previous April, Mr. Boulden had not met with Ms. Hershner to establish a Work Plan, had not conducted any Interim Review with her, had set no goals for her, and had done nothing to either train her himself or direct her to receive any training.

30. Prior to the June 14, 2007 meeting, Mr. Boulden had never informed Ms. Hershner that she was failing to meet his expectations in any way and he had never criticized her job performance in any way. [Exhibit B, T-362-365]

31. In the June 14, 2007 meeting, Mr. Boulden gave Ms. Hershner her performance evaluation for the time period April 1, 2006 through March 31, 2007. (Petitioner’s Exhibit B)

32. This was the very first review Mr. Boulden had ever completed on an employee for HRC. He informed Ms. Hershner upon handing her the negative "BG" review that she had fifteen minutes to read and sign as the review had to be turned in by noon that very day. [T-364, Exhibit B]

33. On the performance review, there is no written plan and no written interim review. Neither had been performed by Mr. Boulden as required by the Department of Administration. Of the thirty-five ratings of Ms. Hershner's performance for the cycle, Mr. Boulden graded Ms. Hershner as "below good" ("BG") on fourteen, "good" ("G") on nineteen and "very good" ("VG") on two. On one of these ratings in the comment section he wrote she was "very good" ("VG"), but only graded her as "good." Her overall rating was assessed as "below good" ("BG"), despite the fact that there were more "G" ratings than "BG" ratings. [Exhibit B]

34. Ms. Hershner appealed her "BG" evaluation to the Department of Administration's Human Resources Management Office. She set out her disagreement with Mr. Boulden's and Mr. Allison's annual evaluation in two letters dated June 19, 2007 and July 15, 2007. [Exhibit B1 (also Respondent's 10) and B2 (also Respondent's 11)]

35. On July 24, 2007 Mr. Boulden filed with the Human Resources Management Office a document he entitled "Addendum to the Performance Appraisal of Millie Hershner" in which he attempts to fill in information to justify the low performance review scores. [Exhibit B3]

36. After Ms. Hershner's June 19, 2007 Appeal Letter [Exhibit B1] pointed out that Mr. Boulden had failed to follow procedure and was prohibited by the Performance Management Guidelines from giving her a "BG" evaluation without first pointing out any deficiencies by way of setting goals, giving warnings or conducting interim reviews, on July 25<sup>th</sup>, Mr. Boulden and Mr. Allison amended their "BG" evaluations of Ms. Hershner, to "G", but left the negative comments as a part of Ms. Hershner's file. [See letter of McKinley Wooten Exhibit C]

37. In an attempt to further defend herself in the "BG" evaluation, Ms. Hershner contacted members of the public whom she had assisted in her role as HRC Attorney I and requested that they write letters on her behalf because of the poor Performance Review she had been given. Those letters were admitted into evidence as Exhibits E1, E2, E3, E4, E5, E6 and E7, which were sent by the authors directly to Mr. Allison and all were highly complementary of the job Ms. Hershner had done for the authors. [T372-75] These client letters are not consistent with Mr. Boulden and Mr. Allison's "BG" review.

38. Ms. Virginia Radcliffe, the author of one of the letters, asked Ms. Hershner about the substance of the problem with her evaluation. To respond, Ms. Hershner provided Ms. Radcliffe with a copy of the Performance Evaluation marked as Exhibit B and the two letters she had sent marked as Exhibits B1 and B2. These letters were not made a part of her employment file, but perhaps should have been since they directly impacted her performance review. [T-375-76]

39. Mr. McKinley Wooten, Jr., Deputy Secretary of the N.C. Department of Administration considered and ruled upon Ms. Hershner's appeal of her Performance Evaluation in his letter of August 16, 2007. Mr. Wooten considered the Performance Evaluation of June 14, 2007 (Exhibit B), the letters above (Exhibits B1, B2 and B3) and another "Performance Management System appraisal signed by Mr. Boulden and Dr. Allison on 7/25/07" which was signed and dated the day after the document admitted into evidence as Exhibit B3, authored by Mr. Boulden, which removed all the "BG" ratings and replaced them with "G" ratings, but left the prior negative comments about Ms. Hershner's work unchanged. [Exhibit C]

40. In his August 16, 2007 directive, Deputy Secretary Wooten wrote that it was "alarming" and "inexcusable" that Mr. Boulden failed to conduct an interim review of Ms. Hershner and yet gave her numerous "BG" ratings when the "development portion" of the plan was "devoid" of any comments. Mr. Wooten noted that the "revised" appraisal dated July 25, 2007, referenced above, changed all the "BG" ratings and replaced them with "G" ratings, without changing any of the comments, which was "incongruous" with a "G" rating. Mr. Wooten Ordered that Mr. Boulden change these comments, within five days, to be revised to reflect the "G" rating. It is clear from Mr. Wooten's review that Mr. Boulden, and Mr. Allison in his concurrence of the evaluation, had failed in the way that Ms. Hershner had been evaluated and managed. [Exhibit C]

41. As is evident by Exhibits C2, C3 and C4, this matter was not resolved until at least October 5, 2007 when Ms. Hershner authored Exhibit C4 to Mr. Allison who had allowed Ms. Hershner to write her own comments to the Performance Evaluation for the cycle. Apparently Mr. Boulden had not complied with Mr. Wooten's order to change the evaluations comments within five days. [T-372]) Mr. Boulden, Mr. Allison and Ms. Hershner all continued employment at HRC while this employment issue of Ms. Hershner's negative and apparently unjustified Review was very slowly, and not in a timely fashion, replaced at the order of Deputy Wooten.

42. Despite the foregoing, on December 12, 2007, Mr. Boulden wrote on Ms. Hershner's first "Interim Review" the following: "Millie's performance has been quite good so far this cycle. She has worked hard and settled several cases. She perfected an appeal and filed a good brief, working long hours to do so. A credible job-keep up the good work." [Exhibit L]

43. Only a few weeks after this positive Interim review of Ms. Hershner by Mr. Boulden, on January 3, 2008, a decision was made by the HRC that the Virginia Radcliffe State Court case would no longer be handled by the HRC. Ms. Radcliffe is the same individual with whom Ms. Hershner discussed her first annual Performance Review, the performance review that she appealed to Mr. Wooten. Ms. Radcliffe is also the same individual with whom Ms. Hershner shared the two letter/documents which should have been in Ms. Hershner's employment file so that Ms. Radcliffe could better understand the circumstances of Ms. Hershner's appeal of her negative review conducted by Mr. Boulden.

44. On that day, Mr. Boulden called Ms. Radcliffe to inform her of the HRC decision not to be involved in her case any longer. Ms. Radcliffe was not happy with that news. After the phone call to Ms. Radcliffe, Mr. Boulden sent an email to Mr. Allison and Ms. Hershner

explaining that Ms. Radcliffe was upset and had promised to complain to administration officials higher up. The pertinent portion of that email for this finding read as follows: "At any rate, I'm sure we can expect more inquiries for the Gov., the commissioners, Sec. Cobb, and anyone else she can think of to complain to. With your permission George, I think I should be the only person to respond to the inquires, so we do not inadvertently give inconsistent answers. Please let me know what you think." [emphasis added] [Exhibit G]

45. Mr. Boulden testified that as a result of the email chain contained in Exhibit G, it was "crystal clear" that Mr. Boulden was the only person at HRC who was to speak with Ms. Radcliffe and that Mr. Boulden was to be the only point of contact with Ms. Radcliffe. Mr. Boulden also testified that his email of January 3, 2008, was confirming an understanding from a prior meeting between Mr. Allison, Ms. Hershner and himself. There is no reference in the emails themselves that refers to any meeting or the substance of such meeting. The email very clearly states that Mr. Boulden is merely asking for permission and stating his opinion that he should be the only person to respond to the inquiries (plural). There had already been a statement that it should be expected that others would inquire about this matter including the Governor and Sec. Cobb. Mr. Boulden contends that the email means only one person was to talk to Ms. Radcliffe, but the plain meaning of this email correspondence does not support his contention. The more obvious meaning of this email is that Mr. Boulden is not asking to be the only person to speak to Ms. Radcliffe, but more broadly to respond to the people who inquire about the complaints she had made to them. In any event, this email string is hardly crystal clear and unambiguous as to what it meant. [T-263, 270, Exhibit G]

46. Ms. Hershner's recollection of the meeting on January 3, 2008 differs from Mr. Boulden in that she contends that there was no conversation about only one person talking with Ms. Radcliffe or that Ms. Hershner was to have no contact. Ms. Hershner's contention is more credible in light of the string of emails.

47. Mr. Boulden further testified that when he was leaving the office on that same day, January 3, 2008, he overheard a conversation Ms. Hershner was having on the telephone which he assumed was with Ms. Radcliffe, although he did not know to whom she was talking. Mr. Boulden contends that this conversation by Ms. Hershner was in direct violation of the agreement of earlier that very day, that agreement being that only he should talk to Ms. Radcliffe. This contention by Mr. Boulden, however, is not supported by what is contained in his email of that same day which he says confirms the agreement. It does not confirm any agreement, it simply asks for permission to respond to inquiries. Even Mr. Allison's email does not specifically state in any manner of absolute terms that Mr. Boulden should be the only person responding—more that it is a good idea for only one person to respond.

48. Mr. Boulden admits he did not stop and address the matter with Ms. Hershner even after overhearing a conversation that he believed was violating his direct order or that of Mr. Allison. He simply let Ms. Hershner continue to talk. Although the conversation was on January 3, no issue was raised until six months later on June 9, 2008, [T-268]

49. On June the 9, 2008, Ms. Hershner received a notification of a pre-disciplinary conference to be held at 10:00 am the next morning in the office of Mr. Allison. This

notification from Mr. Boulden states that the reason for the meeting is to review Ms. Hershner's insubordination and states that in a meeting of January 3<sup>rd</sup>, "Allison indicated that I, as Agency Counsel, should be the only point of contact to communicate with Ms. Radcliffe on behalf of NCHRC. I confirmed my understanding of his instruction in writing later that day in an email from me to Mr. Allison and you. On Friday, January 4, 2008, Mr. Allison replied to my email acknowledging his agreement with my understanding of his instruction." [Exhibit H. T-220, 263, 382]

50. Ms. Hershner's version of these communications, that she did not understand that string of emails to be an absolute prohibition to speak with Ms. Radcliffe, is reasonable and plausible. Mr. Boulden's belief that his interpretation of the emails is reasonable is not compelling. While the emails seem very clear to this finder of fact, the emails of January 3<sup>rd</sup> and 4<sup>th</sup>, between Mr. Boulden, Mr. Allison and Ms. Hershner may be seen as unclear and ambiguous. [T-379-81] The emails simply do not convey the message Mr. Boulden contends that he intended to convey.

51. On June 11, 2008, a final written warning was issued to Ms. Hershner. At the end of the Final Written Warning, Ms. Hershner was given five numbered rules to follow, the last of which was that she may not communicate with Ms. Virginia Radcliffe, "...in any manner, directly or indirectly, without the written permission of the Agency Counsel or the Executive Director. If Ms. Radcliffe contacts you, you shall immediately refer the contact to the Agency Counsel or the Executive Director." [Respondent's Exhibit 1, Petitioner's Exhibit J]

52. There is no evidence that Ms. Hershner ever violated any of these five directives and, in particular, that she ever contacted Ms. Radcliffe again while employed by HRC.

53. Mr. Boulden admitted that Ms. Hershner never violated any of these rules contained in the "Final Written Warning" and Ms. Hershner testified that she never did violate one of these rules and this court specifically finds that she did not. [T-293, 382-85]

54. Ms. Hershner filed a written response to the Final Written Warning on June 18, 2008. [Exhibit I] As she states therein, the directive of January 3<sup>rd</sup> and 4<sup>th</sup> was hardly clear. Further, if Mr. Boulden believed she was violating the order on January 3<sup>rd</sup> when he was listening in on Ms. Hershner's telephone calls, he clearly should have addressed the situation then rather than waiting to review her call log at a later date to try and build a case against Ms. Hershner for violating his order that she not speak to Ms. Radcliffe.

55. It is notable that Ms. Hershner received a "Final" written warning, when prior to that time, she had never received a prior warning on this subject, neither verbal nor written, even though Mr. Boulden had ostensibly caught her in violation.

56. Exactly one week after the issuance of the "Final Written Warning" to Ms. Hershner, on June 18, 2008, Ms. Hershner's year end cycle Performance Management review was conducted by Mr. Boulden and Mr. Allison. [Exhibit L] In this review, Ms. Hershner received a "G" or "VG" in every category, except two. In "Judgment" she was issued a "U" because of the "Final Written Warning" and in "Determinations", she was designated "O", for

outstanding. Her overall grade was only "G", despite many complementary portions of the review, however.

57. Before signing her Performance Review, Ms. Hershner wrote on the evaluation that she believed Mr. Boulden graded with a more difficult scale than other managers and that her overall grade should be higher than a "G" and again reiterated that she did not believe she deserved to receive a "Final Written Warning" because of her "good-faith misinterpretation of a communication from [Boulden]." [T-385-86]

58. Considering the working history of Mr. Boulden and Ms. Hershner, it is remarkable that no evidence was produced by either party of any problems between them or in the work of Ms. Hershner at the HRC all the way through at least May 4, 2009, when Ms. Hershner's year end cycle PMS review was conducted by Mr. Boulden alone. [Mr. Allison was no longer the Executive Director of HRC and his replacement, Mr. Campbell, did not start at HRC until June 1, 2009.] [Exhibit M]

59. In the May 4, 2009 review of Ms. Hershner's performance in thirty-four categories, Mr. Boulden graded her as "G" in only three categories, "VG" in thirty categories and "O" in one. Ms. Hershner's overall assessment was "VG", which assessment Ms. Hershner signed on May 4, 2009 without comment.

60. The Interim review of Exhibit M, dated November 2008, was written and signed by Mr. Boulden and stated that Ms. Hershner had "...worked particularly hard to get determinations drafted." It also noted that although she had difficulty with the Sarmie trial [held in September 2008], it was "...not because of lack of effort" and also acknowledged that it was her first jury trial which she had to conduct alone and without the help of more experienced counsel, which was not the customary way of doing things. [Exhibit M]

61. It is also notable that in this 2009 review, her rating in "judgment" was "VG", where she had been rated "U" in the 2008 annual review (because of the "Final Written Warning").

62. On June 1, 2009, Mr. John Campbell became the new Executive Director of the HRC. On the 15<sup>th</sup> day of that same month, the HRC was notified that it was going to have to relocate the physical site of its offices on July 1, 2009. [T-13, 392, 395-96]

63. On June 18, 2009, Executive Director of HRC, John Campbell, sent a Memorandum to Ms. Hershner requesting information about how certain documents from Ms. Hershner came into the possession of Ms. Virginia Radcliffe who had attached the two documents to a motion she had filed in her case in U.S. District Court. The documents at issue at Petitioner's Exhibits B1 and B2 in this hearing. Mr. Campbell's memorandum identifies these documents as confidential; the question is to whom. In that memorandum, Mr. Campbell writes that his "office is trying to determine how these confidential documents . . . came into Ms. Radcliffe's possession. . . . [i]n order to determine whether State and DOA confidentiality laws and policies, and [Ms. Hershner's] privacy were breached." [Exhibit N1]

64. Ms. Hershner admitted that she had provided these documents to Ms. Radcliffe when she was defending against the negative Performance evaluation in 2007, which was reversed by the order of Deputy Secretary Wooten as discussed above. To the extent the documents are confidential to Ms. Hershner, there is no prohibition of Ms. Hershner revealing information which would be confidential to her, if she so chooses. No evidence at this hearing established or was even offered to show how these documents may have otherwise been confidential. [Exhibit Q2] No statute, rule or policy has been offered defining "confidential" for HRC.

65. The Sarmie case, referred to above, was dismissed by the Superior Court Judge presiding during the course of the trial because the HRC Investigator for the Sarmie case, now Agency Counsel Mr. Boulden, had failed to comply with required procedural notices. That dismissal was appealed to the N.C. Court of Appeals by Ms. Hershner on behalf of the HRC. Ms. Hershner alone compiled the Record on Appeal and drafted all assignments of error. The Record was mailed by the Court of Appeals on July 7, 2009 and received by HRC on July 9 2009, at a time when all the HRC and its staff were in the midst of unpacking boxes from the physical move. The brief was therefore due on or before August 6, 2009. [T-391-93; Respondent's Exhibit 17]

66. Ms. Hershner had the responsibility of writing the brief, and she did not believe she would have any trouble timely completing the task despite being in the midst of the physical move and having all her cases in boxes. At this point in her legal career, she had never missed a filing deadline. [T-394]

67. On July 21, 2009 at 7:45 pm, Ms. Hershner sent the following email to Mr. Boulden and the Supervisor HRC Investigator Maggie Faulcon: "I have sent out some additional interrogatories in the Amini case because there were large discrepancies in the date [sic "data"] from the counsel for the respondents and from the HOA fiscal statement. I have given them 10 days to respond. Millie."

68. On July 22, 2009 at 8:08 am, Mr. Boulden sent the following email to Ms. Hershner, "Thanks Millie, What is the status of the Sarmie brief? What date is it due and when will you have a draft of the argument for review? If you need help with the research or anything else, let me know. That brief is your top priority." The Brief was due, if no extensions were granted, on August 6, 2009. [Exhibit O and Q2 and Respondent's 13, 2 and 17]

69. Ms. Hershner admits that at some point Mr. Boulden did tell her that he wanted her to work only the Sarmie Brief; however, he had told her that the Sarmie brief was her "top priority" just as with this email of July 22. [T-394-95] His communications concerning the Sarmie brief were inconsistent and ambiguous.

70. On that very same evening of July 22, 2009, Ms. Hershner was called into the office of Director Campbell and placed on Administrative leave, instructed to speak to no one at the HRC, that she could take nothing from her office with her and that she'd receive a letter in about thirty days. [T-400]

71. On August 20, 2009, a Memorandum was written to Ms. Hershner by Mr. Boulden informing her that she needed to be present the next morning at 10:00 am for a pre-disciplinary conference in the office of HRC Executive Director, John Campbell, to 1) address the publication of confidential information by Ms. Virginia Radcliffe that was negative about Mr. Boulden, 2) to address her violation of known or written work rules regarding informing a complainant of a determination prior to the issuance of the determination, 3) and to address her insubordination for not dropping everything and working on the Sarmie brief and nothing else. [Exhibit Q2 and State Exhibit 2]

72. The next day Ms. Hershner was dismissed from her employment by the HRC for the reasons stated in the dismissal letter of that same date, August 21, 2009. [T-349]

73. Executive Director John Campbell testified in this contested case hearing. He had only been on the job for a little more than two months when Ms. Hershner was terminated.

74. Mr. Campbell agreed and admitted that Ms. Hershner was not fired because her performance as an Attorney I failed to meet expectations, that Ms. Hershner was not fired because she was not doing her job at the level expected of her, and that she was not fired because of unsuccessful job performance due to her lack of skill or effort. [T-55-56]

75. While testifying and on the stand, Mr. Campbell reviewed for the very first time Ms. Hershner's Performance Management documents. Mr. Campbell agreed and admitted that in reviewing her Performance Review documents from 2006 through 2008 none contained a development plan or an interim plan.

76. Mr. Campbell likewise agreed and admitted that the responsibility for ensuring that they were completed belonged to Mr. Boulden.

77. Mr. Campbell further agreed and admitted that the failure of Mr. Boulden to do so was not fair to the employee, Ms. Hershner.

78. Mr. Campbell also agreed that the amount of time, less than 24 hours, given to Ms. Hershner to address these claims of serious employment issues was not reasonable.

79. Mr. Campbell further agreed and acknowledged that Mr. Boulden's filling out of Ms. Hershner's review forms and his other supervisory management of Ms. Hershner, including yelling at her, was "questionable". [For Mr. Campbell's testimony in paragraphs 73-77, above see T-60-67]

80. Mr. Campbell agreed and admitted that Mr. Boulden's lack of attention to supervisory work over Ms. Hershner as identified by Mr. McKinley Wooten was "inexcusable" and not fair to her. [T-70-72]

81. Mr. Campbell agreed and admitted that receiving a "Final Written Warning without ever having had a prior warning", as happened to Ms. Hershner, is not appropriate. [T102-04]

82. Mr. Campbell further agreed and admitted that Mr. Boulden never gave Ms. Hershner constructive criticism like Mr. Allison had done for Ms. Hershner in her initial annual cycle review. [T-147]

83. Finally, Mr. Campbell agreed and admitted that he never looked at the Employment file of Ms. Hershner to discover any history, negative or otherwise, between Mr. Boulden and her, but rather relied upon what Mr. Boulden represented to him, even after Mr. Campbell knew he was going to decide whether or not to fire her. [T-49-51]

84. Mr. McKinley Wooten testified on behalf of Respondent. According to Mr. Wooten, the rationale and purpose behind the Performance Management review is to give State employees notice of any work deficiencies and to also provide them with an opportunity to "reflect and correct". [T- 189]

85. Mr. Wooten was in attendance at the hearing of this contested case for all the testimony of Mr. Campbell, which confirmed that Ms. Hershner was not provided with any documented warning of any deficiencies nor any documented opportunity to correct them. [T 190]

86. Mr. Wooten also stated that he would not read Exhibit G, the email chain that was the genesis of Ms. Hershner's "Final Written Warning", as a "directive", a violation of which would be sufficient to warrant discharge of an employee. [T 194]

87. It also made no sense to secretary Wooten why Mr. Boulden in his email would be asking for permission to be the only person to speak with Ms. Radcliffe if he had already been given that permission the day before in a meeting. [T 197]

88. Mr. Wooten also opined that if Mr. Boulden had intended for the Sarmie Brief to have been Ms. Hershner's only priority, he should have said so rather than calling the completion of the brief only a "top priority" in his email to Ms. Hershner. [T 198]

89. According to Mr. Wooten, the practice of the Department of Administration was contrary to the way Ms. Hershner was treated with her "Final Written Warning." He explained that the "Final Written Warning" of Ms. Hershner and her rating of "U" on the category of "judgment" in the Performance Management annual cycle ending in 2008, shortly after the Final Warning had been issued, would have no longer been in effect against Ms. Hershner after her next review cycle. This was evident to Mr. Wooten when comparing the 2008 annual review to the Performance Review at the end of the next cycle a year later in 2009. [Exhibit L] The 2009 annual review showed that the problem, if indeed it ever even existed, was cured by 2009. Since "judgment" on the 2009 Review had improved to "VG", she would not still be on "Final Written Warning" after her appraisal in 2009, which was "event specific" for Ms. Hershner.

90. According to Mr. Wooten, the final written warning then, cannot be a part of the reason to terminate Ms. Hershner.

## **Violation of Known or Written Work Rules**

91. Mr. Boulden and Mr. Campbell both state that Respondent's Exhibit 7 is their written authority which prohibits Ms. Hershner from discussing whether a determination will be "cause" or "no cause" before a decision is actually made despite the fact that Exhibit 7 clearly states that it applies to Investigators and not Attorneys. **There was no such written rule pertaining to attorneys produced at the hearing.** There is no evidence before this Tribunal that any such rule exists that is applicable to attorneys at HRC.

92. Mr. Boulden testified that he told Ms. Hershner of the rule repeatedly, but none of the PMS annual review documents of Ms. Hershner for 2006, 2007, 2008 or 2009 show that Ms. Hershner was ever counseled on this issue or for violating it at any time.

93. The first time any written evidence of this claim of an agency rule appears is in the Pre-disciplinary Conference Memorandum authored by Richard Boulden on August 20, 2009.

94. Ms. Hershner denies that she told Ms. Williams what the outcome of her case's determination was going to be, but only that there appeared to be sufficient evidence to establish a "prima facie" case, but reminded Ms. Williams that the Agency Counsel and the Executive Director would have to make the final decision.

95. There is no competent evidence that contradicts what Ms. Hershner admits she told Ms. Williams.

96. Mr. Boulden testified he told Ms. Hershner many times about the purported policy of HRC, but admits that he did not, at least "not explicitly," tell Ms. Hershner that violation of that policy was grounds for dismissal. [T-271]

97. Mr. Boulden testified both that Ms. Hershner should have "drawn conclusions" that the policy existed without being told [T 271] and that he "...would expect an attorney for an investigative agency to understand on her own [without being told]." [T 229-30]

98. If such a policy did in fact exist, Mr. Boulden violated the policy himself when he admitted in cross examination that he told Ms. Robinson that first it was one way and then it was the other way and "back and forth", admitting that back and forth meant "cause" or "no cause." [T 259]

99. Maggie Falcon testified in the contested case hearing. Ms. Falcon began work as an Investigator at HRC in 1985, became the Supervisor of the Investigators at the HRC and worked there until a short time after Ms. Hershner was fired. Ms. Falcon testified that if such a policy ever existed, it did not apply to attorneys and she had never heard of even an investigator being disciplined for discussing potential determinations with a party based on how the evidence appeared in the investigative stages. [T 312-15]

100. Ms. Falcon never heard of anyone ever even being disciplined for discussing the likelihood of the determination with a party, and for certain, never heard of anyone losing their job over such a thing. [T 323]

101. The state has not met its burden or in any way established that a known or written work rule or policy for attorneys to not discuss determinations with complainants even existed, much less that a violation of such policy was grounds for dismissal since the competent evidence was that others had discussed potential determinations without any discipline and especially with no one being dismissed from employment. If such a rule did exist it had not been enforced and to use as grounds for termination of Ms. Hershner would be arbitrary and/or capricious.

### **Insubordination**

102. The issue of Ms. Hershner's handling of the Sarimi brief is discussed above. It is specifically found that Mr. Boulden did not give Ms. Hershner a clear and consistent directive to work only on the Sarimi brief as he contends. The credible evidence is that it was a top priority but not the only priority.

103. Mr. Donald R. Teeter, Special Deputy from the Attorney General's Office was brought in to pursue the appeal since Ms. Hershner had been sent out on administrative leave and Mr. Boulden had been a witness in the trial. Mr. Teeter assessed the likelihood of success on appeal as being very poor. (Respondent Exhibit 23).

104. Mr. Boulden agreed with the letter of Don Teeter, dated December 2, 2009, that the case was a weak one to appeal. Mr. Boulden's agreement with Mr. Teeter that the appeal was weak is not consistent with Mr. Boulden's insistence that the brief was so important that it should be the only thing Ms. Hershner was to work on. Mr. Boulden had already staked himself out to a position that Ms. Hershner should not be at fault for any short-comings in the trial of the Sarimi matter since it was her first jury trial and she was not given any assistance as was customary. (See Finding of Fact # 60 above) Further, the basis for the case being dismissed was Mr. Boulden's purported failure to comply with required procedural deadlines. There was still more than two weeks before the brief was due when Ms. Hershner was sent home on administrative leave, presumably sufficient time to do the brief.

105. If writing the Sarmie brief was the only thing that Mr. Boulden was going to direct Ms. Hershner to work on during this time period, he could have very easily said so, but instead he told Ms. Hershner even up to the day she was sent on administrative leave, that the brief was not her only priority. He instead told her it was her "top priority".

106. There was no evidence that she had never missed a deadline or that she had difficulty in balancing her work load.

107. In an email Executive Director Mr. Allison commended Ms. Hershner for delaying her vacation to make sure her job was performed first, before she enjoyed her own

personal time off, indicative of an employee who is unwilling to make personal sacrifices to make sure her job is completed. [Exhibit C4]

108. The Sarmie Appeal was ultimately withdrawn and the brief never written and never filed.

109. Under the facts and circumstances of this case, the Respondent has failed in its burden of proof to establish that Ms. Hershner was insubordinate and that grounds existed to terminate an employee for not working on the brief.

### **Conduct unbecoming a state employee that is detrimental to state service**

110. Ms. Hershner shared with Virginia Radcliffe two letters she had written as part of her appeal of the work evaluation by Mr. Boulden in 2007. She contends that she did so in order to defend herself from the poor work evaluation by Mr. Boulden. She contends that the two letters perhaps should have been a part of her personnel file with the Department of Administration but were not.

111. Ms. Hershner's contention that the letters should have been in her personnel file and that she could disseminate such information to defend herself is not dispositive and not completely on point.

112. The essential question that must be answered is what information is considered confidential in the context of Ms. Hershner's employment with the Commission. Alternatively, when is information gathered by the Commission considered public information?

113. Neither party presented any policy, rule or statute which establishes what constitutes "confidential" information nor under what circumstances could such confidential information be shared with others.

114. The rules of the Commission do not address confidentiality.

115. N. C. Gen. Stat. Chap. § 41A is the State Fair Housing Act. The Act does not address confidentiality other than to state that the terms of a conciliation agreement shall be made public with some exceptions; thereby implying perhaps that matters are not public before the conciliation agreement is reached. N. C. G. S. § 41A-7. N. C. G. S. § 41A-8 addresses investigations and subpoenas and sets forth the various forms of data to which the Commission has access during an investigation; however, "confidentiality" is not mentioned in that section.

116. It is not known whether or not the Federal Fair Housing Act establishes any rules of confidentiality which would be applicable to the State investigations and neither party made any representation of the applicability of the Federal Fair Housing Act in this matter. The Act was not tendered into evidence or otherwise referenced.

117. Assuming *arguendo* that confidentiality does apply, then the question to be answered is to what degree could Ms. Hershner share information.

118. The North Carolina State Bar Rules of Professional Conduct addresses confidentiality of information in Rule 1.6 which states that “(b) [A] lawyer may reveal (confidential) information protected from disclosure . . . to the extent the lawyer reasonably believes necessary: (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; . . .” (Emphasis added) Therefore, it is the lawyer’s perception of when it is necessary to release such information, but that belief must be a reasonable one.

119. The Notes to Rule 1.6 state that the lawyer “must act competently to safeguard information” and that the lawyer “must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.” The method of communication should afford a “reasonable expectation of privacy.”

120. Ms. Hershner’s communications were initially addressed to Mr. Wooten in order to defend against what she felt was an unwarranted evaluation. In those letters she specifically mentioned by name and in varying detail the Robinson, Seelig, Radcliffe, Stavaredes and Thompson cases.

121. In sending those letters to Mr. Wooten, she was defending herself in a fashion as envisioned by the State Bar Rules. The communications were in a manner with reasonable expectation of privacy.

122. In giving Ms. Radcliffe those very same letters there was no expectation of privacy and in fact they were used in a manner that demonstrated no expectation of privacy and that no confidences were to be protected.

123. It was not necessary to provide Ms. Radcliffe those letters for Ms. Hershner’s defense. She had asked others to write on her behalf as well but did not provide them with the letters. Even if she reasonably wanted to give Ms. Radcliffe more information, it was not necessary to divulge the information to the degree in the two letters. She and Ms. Radcliffe were not personal friends and the information concerning the specifics of the other cases was not necessary in order for Ms. Radcliffe to write on behalf of Ms. Hershner.

124. The tenor of the notes to the Bar Rules is such that the divulgence of any confidential information would be to the third party raising the issue concerning the lawyer. In this instance that would properly be addressed to Mr. Wooten’s review, and not by divulging to Ms. Radcliffe.

125. Ms. Faulcon’s blanket statement that there is nothing wrong with disclosing one’s personnel file to whomever one wishes does not seem credible, especially as in this case. In the first instance, the letters were not in Ms. Hershner’s personnel file—rightly or wrongly. Secondly, even if information is in one’s own personnel file, any otherwise confidential information would be prohibited from being divulged.

126. Although the Respondent offered no evidence whatsoever which made the letters sent to Ms. Radcliffe confidential, or in any manner established what was confidential, it was at the very least poor judgment and improvident of Ms. Hershner to send the letter's with such information about cases within the Commission to Ms. Radcliffe.

127. Ms. Hershner was never warned, counseled or corrected on this issue.

128. The Commission's contention that her divulging the letter's opened the agency to lawsuits is without merit and is not justification for her termination.

129. An important portion of the complaint against Ms. Hershner, as evidenced by Mr. Boulden in the August 20, 2009 Pre-Disciplinary conference Notification Memorandum, is that the letters were considered by Mr. Boulden, the author of the Memorandum, to be "...personal and professional attacks on me." Ms. Hershner's letters were in deed unflattering to Mr. Boulden in particular and the agency in general.

130. Ms. Hershner's contention that her positive evaluation of May 4, 2009 should have been included in her review before the Final Agency Decision is of no consequence. While such may or may not have made a difference with the reviewer, this contested case hearing is a new start and dependent upon the evidence offered in this hearing, not what the previous reviewer may have considered. It is recognized that she was only given twenty four hours or less to prepare for her pre-disciplinary conference and, considering the length, depth and breadth of the allegations, twenty four hours was not sufficient time for her to prepare any defense, as acknowledged by Mr. Campbell.

131. There is no evidence that Ms. Hershner ever disobeyed a reasonable, clear and unambiguous directive of a superior.

132. Although it has not been articulated by either party, it seems that dissension and acrimony existed between Mr. Boulden and Ms. Hershner which stemmed from a series of events which created this "perfect storm." It began with Ms. Hershner being hired as an attorney when Mr. Boulden was already at the agency and with more years of experience as an attorney. Her hire made her Mr. Boulden's supervisor. The situation was compounded in a few months with Mr. Boulden being hired into the attorney position which then supervised Ms. Hershner. The situation was made worse still because of the disagreement between Mr. Boulden and Ms. Hershner over the "cause" or "no cause" of the Robinson case. Mr. Boulden began that case as the investigator. It was sent to Ms. Hershner as attorney for review, and before it was finalized Mr. Boulden was promoted to the superior position that had the final say on the matter. It would have probably been more appropriate for Mr. Boulden to have not signed off on the Robinson case since he had been the investigator. In spite of all of that, at times they seemed to work well together.

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 126 and 150B of the N.C. General Statutes and all parties properly had notice of the hearing.

2. At the time of her dismissal, Petitioner was a career State employee subject to the State Personnel Act, N.C.G.S. § 126-1 et seq. Petitioner, therefore, could only be warned, demoted, suspended or dismissed by Respondent for “just cause”. N.C.G.S. § 126-35(A): 25 N.C.A.C. 01J .0604(a).

3. Pursuant to N.C.G.S. § 126-35(d), the burden of proof is on Respondent to show it had “just cause” to dismiss Petitioner for unacceptable personal conduct.

4. “Just Cause” is a flexible concept, embodying notions of equity and fairness that can only be determined up an examination of the facts and circumstance of each individual case. NCDENR v. Carroll, 358 N.C. 649, 669 (2004).

5. An employee may be dismissed for unacceptable personal conduct without any prior disciplinary actions. (Respondent’s Exhibit 4, p. 7). Therefore, the prior “final written warning” would not necessarily apply. According to Mr. Wooten, the conditions of the final written warning should not have been considered anyway, since it was fact specific and the condition precedent had been satisfied. The evidence also showed that a “final” written warning was not appropriate since there had been no prior warnings. For the other reasons set forth in the findings of fact, the final written warning should not have been considered in making the decision to terminate.

6. NCDOA, “Disciplinary Action and Dismissal Policy”, p. 10, and State Personnel Manual, “Disciplinary Action, Suspension and Dismissal” provides: Unacceptable Personal Conduct - An act that is:

(d) the willful violation of known or written work rules; or

(e) conduct unbecoming a State employee that is detrimental to State service; or

(f) willful failure or refusal to carry out a reasonable order from an authorized supervisor is insubordination for which any level of discipline, including dismissal, may be imposed without prior warning.

(Respondent’s Exhibits 4 and 5, and 25 N.C.A.C. 1J.0614(h), (i)(4), and (i)(5)).

7. Petitioner was dismissed in part for the willful violation of a known work rule, based on Petitioner informing Ms. Williams that she thought Williams’ case was “cause” before a final determination had been made. (T pp. 40, 155, 229, Respondent’s Exhibit 2).

8. The state has not met its burden or in any way established that a known or written work rule or policy for attorneys to not discuss determinations with complainants even existed, much less that a violation of such policy was grounds for dismissal since the competent evidence was that others (investigators) had discussed potential determinations without any discipline and especially with no one being dismissed from employment. The only work rule introduced applies to non-attorney Investigators. If such a rule did exist it had not been enforced and to use as grounds for termination of Ms. Hershner would be arbitrary and/or capricious.

9. Petitioner was dismissed for conduct unbecoming a State employee that is detrimental to State service. Petitioner provided Ms. Radcliffe with two letters she had written to NCDOA, HR, in appealing a poor performance evaluation written by Mr. Boulden. The Commission contends that the letters contained confidential information about cases and derogatory comments about her supervisor and HRC, which subjected HRC to potential lawsuits (T pp. 375, 433, Respondent's Exhibits 10 and 11)

10. No evidence was produced to define what constitutes confidential information and/ or when such information may become public. The Commission offered no policy, rule or statute to establish confidentiality. Mere averments that matters are confidential are not controlling.

11. The Respondent failed to meet its burden to establish that any information released by the Petitioner in defending herself against a poor performance review conducted by Mr. Boulden was confidential.

12. The Respondent failed to meet its burden to establish that the release of information by Ms. Hershner was detrimental to state service simply because it may have been negative regarding her Supervisor. While certainly not condoning such practice, it should be noted that if every State employee was terminated who had made unkind and negative comments about their supervisors and/or agency, it would create wholesale unemployment and massive turn-over. In this case in particular, Ms. Hershner's comments may have been poor judgment and improvident but she was somewhat vindicated by Deputy Secretary McKinnley Wooten reversing the evaluation.

13. Respondent's contention that the release of information to Ms. Radcliffe and the derogatory comments contained therein would subject the Commission to potential lawsuits is without merit. Certainly no more so than the findings of fact contained in this Decision. Assuming *arguendo* that such would be actionable, termination would not be appropriate under the facts and circumstances of this case.

14. Under the facts and circumstances of this case and the evidence produced in this contested case hearing, Ms. Hershner providing the letters to Ms. Radcliffe does that bring such disrepute to State government that it rises to the level of "conduct unbecoming a State employee that is detrimental to State service" such that she should be terminated.

15. Petitioner was dismissed in part for insubordination for failure to follow her supervisor's instructions. Respondent contends that Mr. Boulden told her to drop everything and work only on the Sarmie brief.

16. Petitioner admitted that on at least one occasion Mr. Boulden told her to drop everything and work on the Sarmie brief, but in light of the other instructions, particularly those in writing, the Sarmi brief was to be a top priority—not her only priority. Even the very day the Petitioner was placed on administrative leave, she was told by the Agency Counsel that the brief was only a “top priority,” not her only priority. The instructions concerning the Sarmi brief were ambiguous.

17. The Respondent failed to carry its burden that the Petitioner was insubordinate in her handling of the writing of the Appellate Brief. Petitioner had never missed a filing deadline in her work at the HRC, and she still had fifteen days remaining within which to finish the brief before its due date when she was placed on administrative leave by the Mr. Boulden. In light of the facts and circumstances surrounding the Sarmi case in total, it would be anything but “just” to terminate Petitioner for not having completed the brief in the time demanded when she had ample time remaining to finish the brief. The appeal was ultimately abandoned at the suggestion and advice of the Attorney General's Office, without ever having filed the brief.

18. “‘Just cause,’ like justice itself, is not susceptible of precise definition. It is a “flexible concept, embodying notions of equity and fairness,” that can only be determined upon an examination of the facts and circumstances of each individual case. N. Carolina Dept. of Env't & Natural Res. v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)

19. The Respondent lacked just cause to dismiss the Petitioner.

### **DECISION**

The undersigned Administrative Law Judge finds that the Respondent's dismissal of Petitioner for just cause is unwarranted and must be REVERSED. The Respondent is ordered to reinstate Petitioner to the same or similar position, provide her back pay and benefits from the date of the dismissal until the date of reinstatement as provided by law and pay Petitioner's reasonable attorney's fees.


### **ORDER AND NOTICE**

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen.

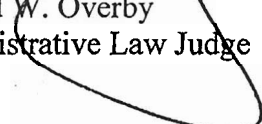
Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 3rd day of February, 2012.



---

Donald W. Overby  
Administrative Law Judge



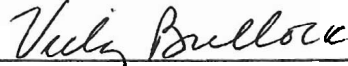
A copy of the foregoing was mailed to:

John W. Bryant  
J. W. Bryant Law Firm, PLLC  
PO Drawer 909  
Raleigh, NC 27602  
ATTORNEY FOR PETITIONER

Amber I Hayles  
J. W. Bryant Law Firm, PLLC  
P O Drawer 909  
Raleigh, NC 27602  
ATTORNEY FOR PETITIONER

Ann Stone  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 6th day of February, 2012.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100